FILED
SEP 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

(13)

NO. 87-1651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

DOUGLAS OAKES,
Respondent.

On Writ of Certiorari to the Supreme Judicial Court of The Commonwealth of Massachusetts

BRIEF *AMICUS CURIAE* OF THE LAW & HUMANITIES INSTITUTE IN SUPPORT OF RESPONDENT

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NO. 87-1651

COMMONWEALTH OF MASSACHUSETTS,

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v.

DOUGLAS OAKES,

Respondent.

BRIEF AMICUS CURIAE OF
THE LAW & HUMANITIES INSTITUTE
In Support of Respondent

INTEREST OF AMICUS CURIAE AND PRELIMINARY STATEMENT

This brief is submitted with the written consents of the parties, on file with the clerk. The Law and Humanities Institute ("LHI") is a not-for-profit foundation concerned to strengthen the

interrelations between law and the humanities. To this end, LHI brings together lawyers, professors, literary critics, writers, and other creative artists to discuss common interests and problems.

An important feature of LHI's work is to monitor legal developments that may have importance for the free expression of creative artists and the artistic imagination. Thus LHI sponsors conferences, discussion groups and publications on law in literature and on the bearing of law on literary and artistic freedom. It also participates amicus curiae in selected court cases in the hope that it may be able to assist the courts to reach better-informed decisions on questions affecting literary and artistic freedom.

LHI views the Massachusetts statute being challenged in this case, and the con-

viction and sentencing of Respondent pursuant to that statute, with the utmost concern. Taken together, they represent a grave threat to the freedom of photographic expression and to parental rights and family privacies. For the first time known to us a "child pornography" law has been used to sentence a person to an extended prison term for taking "pin-up" photographs of his teen-aged stepdaughter in the family home. (Trial Exhibits 1-10). No evidence was introduced -- for none was needed to convict under the statute -- to show that this person's act was in any way or degree "sexually abusive," "exploitative" or otherwise harmful to the child, or intended to be. Such evidence as was introduced concerning his and his stepdaughter's motives signifies only that the furtherance of her young modeling career was uppermost

in both minds.

On this record, the Supreme Judicial Court of Massachusetts reversed Respondent's conviction and struck down the statute for being unconstitutionally overbroad. It did so out of its concern to protect from widespread infringement under the Massachusetts law the First Amendment rights of others--parents, photographers, and artists--who may also choose to make visual representations of children nude, or partially clad. Amicus believes that this is a vital right of all persons engaged in the visual arts, and all persons interested in what such arts can tell us about the human condition, including the children who become the subjects of photographs, films, and other artistic works.

Because the Massachusetts statute which was used to punish Respondent poses a seri-

ous threat to artistic freedom, and because we are persuaded that such a threat is unnecessary to the achievement of the legitimate goals of a "child pornography" law, LHI asks the Court to affirm the decision reached by the Supreme Judicial Court of Massachusetts in the interest of preserving the vital constitutional freedoms of speech and press for all.

ARGUMENT

I Photography is a vital medium of communication and means of expression. Nude children, as well as adults, have long provided important themes for photographers.

Ever since 1839 when the first photographic technique -- the daguerrotype -- was discovered by Louis-Jacques-Mandé Daguerre, photography has been a vital means

of communication and expression. Its social impact and importance has been immense. [Bourdieu, Un Art Moyen (1965); Freund, Photographie et societe (1974)]. It has been used to explore inner and outer worlds; the lives, loves and deaths of people, cities, countries, and cultures; and conditions of war, peace, health, wealth, poverty, work, play, happiness, age, youth, love, hate, desire, greed, beauty, and sex. [Szarkowski, Mirrors and Windows: American Photography Since 1960 (1978); Green, American Photography: A Critical History from, 1945 to the Present (1984); Szarkwoski, "Photography and the Mass Media," Aperture, Vol. 13, No. 13, (1967).] Probably more has been said about what is happening in the world in human terms, through the works of photographers, than it is possible for words to describe.

In 1840, the year after Daguerre perfected his historic technique, another Frenchman, Noel Lerebours, took the first nude photographs. These were mostly used by painters for reference. [Newhall, The History of Photography (1964); Miller, Click (1974); Lemagy and Rouille, A History of Photography (1987).]

At first, "sanctified by venerable artistic tradition" from ancient art onward, early photographers sought to imitate painters by stylizing nude images and placing them within "neoclassical" settings. As the artistic vocabulary of photography broadened, however, the "nude" in photography emerged as an art unto itself--"capable of its own kind of beauty." Since the middle of the 20th century, nearly every serious photographer has made the "nude" part of his or her study, if not part of

his or her oeuvre. [Ovenden, Victorian Erotic Photography (St. Martin's Press, 1973, p. 7)]

While nude photography has concerned itself primarily with adults, especially adult women, many photographers photographed nude children, thereby producing some of the world's most acclaimed photographs. Some of the same themes apparent in photographs of adult nudes--the realistic portrayal vs. the idealization of the human body, the artistic concern with light and form, the expression of erotic sentiment on the part of photographer, subject, or both--carried over to nudes of children. (See the photographs reproduced in Appendix A.) Several themes particular to child nudes emerged: innocence and vulnerability, sometimes more poignant in the naked state; the depiction of an emerging and uncorrupted sexuality; and sentimentality, like that felt by a parent for his or her child at certain junctures in life.

During the first half of the 20th century, with the greater availability of cameras and the simplification of photographic technology, both the number of art photographers and the number of photographs of nude children increased. Then, in the late 1920's and early 30's, a new theme -- the celebration of the naked human body -- emerged from the American and European nudist movements. These movements spawned a plethora of magazines -- some of them still produced today -- promoting physical and mental health in general, and the nudist lifestyle in particular; the core of this has been the family. The magazines often depict children, naked and happily at play, in testimony to the fact that nudity,

shame, and guilt are not intrinsically connected. The celebration of the naked human body became a theme greatly elaborated upon during the 60's and early 70's, when the publication of nudist magazines reached a peak.

With the rise of feminism, during the mid-to-late 1970's and 80's, additional themes emerged in the photographing of the child nude. The affirmation and celebration of the often somber beauty of child sexuality, as well as the problem of reconstituting female sexuality in patriarchal society, were explored by women photographers. The connection between women as "mothers" and "nurturers" and children also was investigated photographically. At the same time, experimentation with erotic, but non-pornographic, nudes of children flourished.

It was during this period, that "child pornography" came to be identified as a serious social problem. [See "Sexual Exploitation of Children," Hearings Before Subcommittee on Crime, Committee of the Judiciary, H.R., May 23, 25, June 10, and September 20, 1977.]

A list of artists who photographed nude children over the past thirty years reads like a "Who's Who" of photography: Irving Penn, Ralpy Eugene Meatyard, Emmet Gowin, Wynn Bullock, Harry Callahan, Joel Meyerowitz, Starr Ockenga, Ellen Brooks, Robert Mapplethorpe, Ralph Gibson and Sally Mann, are just a few photographers whose child nudes have been published in books and collected by museums throughout the United States and the world over. (See Appendices A and B). Because photographing the child nude offers artists (and their audiences)

realms of expression not available with other subject matter, the nude child became an important subject for photography -- one that American photographers and their audiences would be expected to continue to address unless kept from doing so by the "chilling" applicability of a law like that of Massachusetts which makes the taking of pictures of nude children a serious criminal offense.

II Photography is a form of expression entitled to First Amendment protection. The "setting-up" (posing) and "taking" of a picture is an integral part of the photographic process culminating in the developed film and printed photograph. All this "expressive conduct" should be protected by the First Amendment.

Unwilling to allow photographic freedom to be emasculated, the Supreme Judicial Court of Massachusetts struck down the law [G.L.c. 272, §29A (1986 ed.).] in Douglas

Oakes' case. In striking it down, the Court started with a proposition which it thought not seriously debatable: "Photography is a form of expression entitled to First Amendment protection just as the written or spoken word is protected." [401 Mass. 602, 603; 518 N.E. 2d 836, 837 (1988).]

We agree. Like motion pictures [Burstyn v. Wilson, 343 U.S. 495 (1952)], still photography has become a vital medium for the communication of news, information and ideas. [Lemagny and Rouillé, A History of Photography (1987).] And like most other media of communication, photography is a process with a beginning, middle and end. The process may be said to begin with the photographic idea, go on to the setting up and taking of the picture, and end with the exhibition of the printed photograph. The

conduct of the photographer in setting up and taking the picture is an integral part of the process of photographic expression; it cannot meaningfully be segregated from the other steps of the process for purposes of First Amendment analysis. In the context of the instant case, as the Supreme Judicial Court recognized: "The defendant's conduct in permitting his stepdaughter to pose naked above the waist cannot fairly be isolated...for First Amendment purposes, from the expressive process of taking her picture." The opinion continued: "The circumstances involved at all times both conduct and speech in the First Amendment sense." [401 Mass. 602, 603; 518 N.E. 2d 836, 837 (1988).]

The question of whether a person's behavior is to be characterized as "conduct" or "speech," or both, may have

important First Amendment implications. [See United States v. O'Brien, 391 U.S. 367 (1968); Gooding v. Wilson, 405 U.S. 518 (1972); Broadrick v. Oklahoma, 413 U.S. 601 (1973); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)] Pure conduct is sometimes said to be unprotected by that Amendment whereas pure speech is usually treated as protected; again, the overbreadth doctrine is supposed to apply not to conduct but to speech. It seems to us, however, that the speech-conduct dichotomy familiar to this Court's First Amendment jurisprudence has not always proved helpful to a clear analysis and resolution of the free speech interests at stake. [See Henkin, The Supreme Court, 1967 Term--Forward: On Drawing Lines, 82 Harv. L. Rev. 63, 76-82 (1968).]

With respect to an art such as paint-

ing, drama, photography, or motion pictures, as with regard to a print medium such as newspapers, magazines or books, it would seem unlikely to matter whether the policeman stands at the elbow of the artist at work, or at the side of his exhibitor; at the elbow of the writer at work, or at the side of the person who publishes or distributes his work. The communication protected by the First Amendment is a process by which thoughts, emotions, images, and ideas are formulated by persons and worked into and out of this or that medium of communication, or form of expression. Thus the "posing of a model" and the "taking of a picture" are best understood as being integral parts of a complex process of creating a visual representation and exhibiting it.

It is accordingly our position that

whenever a statute makes "conduct" an element of a prohibition which restrains "speech" or other expressive actions ordinarily covered by the First Amendment, the overbreadth aspects of First Amendment jurisprudence should apply to both the conduct and the speech elements. If either the expression or the conduct covered by the statute includes action or expression which cannot constitutionally be prohibited, then the statute is unconstitutional even if the particular conduct or expression involved in Respondent's case could constitutionally be proscribed. This means, in the instant case, that First Amendment protections should apply to the conduct of Respondent Oakes in posing and photographing his stepdaughter "in a state of nudity" as well as to the printed photographs which expressed the results of

his conduct. It also means that the First Amendment overbreadth doctrine should apply to the conduct of parents and photographers who permit or cause children to be photographed nude.

The conduct prohibited under the challenged provision of Massachusetts law, Section 29A, is prohibited only when such conduct is engaged in "for purpose of visual representation or reproduction" in any book, magazine, pamphlet, motion picture film, photograph, or picture." Inasmuch as such "visual representation or reproduction is undoubtedly expression of the type that is normally covered by the First Amendment, the entire provision of Section 29A should be subject to the doctrines applicable to speech and press.

Finally, it should be observed that at the time of Respondent's indictment, the

dissemination (or possession for dissemination) of any photographic or film work depicting a nude child, which was created notwithstanding the prohibitions of Section 29A, was independently criminalized and threatened with the same severe punishment as was the conduct of creation--under Section 29B.[1] Thus, the State itself recognizes that the acts of setting-up and taking a photograph are integral parts of an expressive process leading to exhibition or distribution, and having First Amendment implications.

III Most "child pornography" laws (including the "Ferber Law") were properly

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[1]"Whoever disseminates any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity or of any act that depicts, describes, or represents sexual conduct participated or engaged in by a child...shall be punished in the state prison..."

designed to prevent and punish only the taking of pictures or making of films which involved children in specifically defined "sexual conduct" or "the lewd exhibition of the genitals" because such conduct and exhibition were reasonably feared to be "harmful to the physiological, emotional, and mental health of the child." Section 29A of the Massachusetts law, by contrast, also outlaws visual depictions of child "nudity" although there is no reason to believe nudity is harmful to children. Many people believe it healthful and esthetically beautiful.

During the 1970's most states and the federal government passed laws which reflected wide-spread fears that American children were being mentally and physically harmed by the commercial production and dissemination of "child pornography." [See "Sexual Exploitation of Children," Hearings Before the Subcommittee on Crime of the Committee on the Judiciary, H.R., May 23, 25, June 10 and September 20, 1977; New York v. Ferber, 458 U.S. 747 (1982).] The

harm feared was usually depicted as the sexual "abuse" or sexual "exploitation" of children; one suspected source of the harm, targeted by the new legislation, was the "widespread... photographing and filming (of) actual and simulated sexual acts involving children and distributing the products in interstate commerce." [Hearings, id., at 1]. Although most of those believed responsible were persons who "use inducements such as money, drugs, and representations of friendship to entice their young victims...in some instances even parents are inducing or permitting their own children in these practices." [Id.] Although the Chairman of the House Subcommittee which hel hearings on the subject in 1977 thought that "the solution to problems of sexual abuse and exploitation of young people perhaps does not lie

in increased criminal laws, but rather in approaching the problem through increased and improved attention in the areas such as child care, education, mental health, family support, juvenile delinquency facilities and employment," [Hearings, Id. at 3] the "solution" finally hit upon by the federal and state governments was more criminal laws promising very heavy penalties of fine and imprisonment for anyone, including parents, who caused or permitted children to engage in "sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct" [Public Law 95-225, 95th Congress, Feb. 6, 1978 (S.1585)].

The original federal legislative proposal to combat the sexual exploitation of children in photographs and films, and the dissemination of photographs or films de-

picting such exploitation, defined "child" as any person under sixteen and defined the prohibited sexual conduct quite specifically to include sexual intercourse, anal intercourse, masturbation, sadism and masochism, bestiality, fellatio, cunnilingus, and: "nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." The Justice Department told the Congress that it found the provision regarding "nudity" "troublesome" because "it would be difficult to determine by what standard the 'sexual stimulation or gratification' could be assessed." Instead, the Department recommended use of the words "lewd exhibition of the genitals," which it pointed out was "a phrase used by the Chief Justice (Warren E. Burger) in Miller v. California, [413 U.S.

15 (1972)] ...to describe one of a variety of types of conduct which could be prohibited under state obscenity statutes." [H.R. Report No. 95-696, "Prohibiting the Sexual Exploitation of Children," 95th Cong. 1st Sess., Oct. 12, 1977 at p. 21; Testimony of John C. Keeney, in Hearings, ibid at 137.]

The phrase "lewd exhibition of the genitals" which the Congress substituted for the prohibition against "nudity," before the federal law was passed, was described by another witness at the House Committee hearings as referring to: "naked, spread-eagled children;" such poses were familiar to the witness and readers of the magazine entitled "Lollitots." [Testimony of Dr. Judianne Densen-Gerber, Hearings, ibid at 41]. Pictures of children posed in that way were apparently taken in

imitation of similar photographs of adult women, for run-of-the-mill "soft-core pornography."

As enacted, the federal law, like virtually all State laws that were enacted to combat the evil of child pornography, did not attempt to prevent photographic or filmed depictions of children "nude" or in a "state of nudity"--except, that is, indirectly to the extent that children engaging in the specifically prohibited sexual conduct might do so nude. Instead, the typical child pornography laws sought to prevent persons from causing or permitting children to be photographed or filmed engaged in "sexually explicit conduct," or "sexual conduct," which usually was specifically defined to include the "lewd exhibition of the genitals," as well as "sexual intercourse," "bestiality," "masturbation,"

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and like activities.

Unlike the production of visual depictions of children engaged in explicit sexual conduct, the production of visual depictions of nude children was not identified by legislators as involving incidents of child sexual abuse or exploitation. The reasons were probably three-fold: first, unlike the defined types of "sexual conduct" of children, nudity in children and visual representations of children nude had long been considered morally acceptable aspects of much family life and a well-known photographic tradition; permitting or causing children to "go nude," or be photographed nude, was okay. Second -- and again, unlike the case with "sexual conduct" -- it was generally not feared that permitting or causing children to be photographed nude was harmful to the

children; such behavior--certainly when consented to by parent and child--was not considered a type of child abuse or exploitation. Third, to prohibit the production of nudity in minors was thought likely to be held unconstitutional given this Court's decisions in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) and Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958).

When, therefore, Massachusetts enacted into law a provision (Section 29A) which made it criminal for anyone, including a parent, to cause or permit a person under the age of 18 to be photographed "in a state of nudity,"[2] the state departed

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[2]The original version of Section 29A was adopted in 1977, Mass. Acts Ch. 917, §1. Section 29A was apparently amended following the Supreme Judicial Bench's decision in Oakes to require a showing that the defendant caused or permitted a child to pose or be exhibited "in a state of

radically from social norms as well as the legislative pattern established for child pornography laws by the United States Congress and the other states. We know of only two other States which appear to have taken this extreme approach -- Kansas, §21-3516, Kan. Stat. Ann. (Supp. 1987); and Ohio, in §2907.323, Ohio Rev. Code Ann. (1987 & Supp. 1987).

In the words of the Supreme Judicial Bench of Massachusetts, Section 29A "crimi-

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nudity," "with lascivious intent." Amicus expresses no view concerning the constitutionality of this addition except to note that similar language originally proposed in connection with federal legislation was thought by the Justice Department to be "troublesome" because the standard was so subjective. We also note that were the Commonwealth required to prove that Respondent Oakes took pictures of his stepdaughter "with lascivious intent," or a similar mens rea, the uncontroverted evidence indicates, to the contrary, that he did it with a motive to further his step-daughter's modeling career.

nalizes conduct that virtually every person would regard as lawful" and "makes a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool." (Commonwealth v. Oakes, 401 Mass. 602, 606; 518 N.E. 2d 836, 838 (1988).

There is no reason to believe and there is no evidence (scientific or otherwise) to support the notion that permitting or causing a child to be, or pose, in the "nude" is harmful to the child.[3] Neither is such a notion supported by common sense or

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[3]The prosecuting attorney in this case, the District Attorney for the Middle District of Massachusetts, disagrees: He speculated (wtihout citing any authority) that: "Although they may not be engaging in actual or simulated sexual intercourse, children appearing nude already are being sexually exploited and run the risk of being drawn deeper into child pornography." [Brief for the Commonwealth in Commonwealth v. Oakes, No. 86-147, Commonwealth Appeals Court at page 7.]

experience which, instead, suggest that nudity and the depiction of nudity, in children, may, under some circumstances, certainly, be healthful and esthetically beautiful. To the extent that the Massachusetts law applied in this case criminalizes sexual conduct,[4] but also the mere depiction of the nude child, it has no basis in reason or experience. Since the law also sweepingly invades the First Amendment activities of photographers, film-makers and artists as well as parents; abrogates

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[4]The depictions of "sexual conduct" forbidden by the Massachesetts law in question are defined to include: "human masturbation, sexual intercourse, actual or simulated, normal or perverted, or any touching of the genitals, pubic areas, or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals; any depiction or representation of excretory functions; any lewd exhibition of the genitals, flagellation, or torture in the context of a sexual relationship." [Section 29B]

the traditional rights of parents to control their children as they see fit; and invades the protected privacies of family and home, the statutory provision involved, Section 29A, should be struck down. In these respects, the Massachusetts law differs sharply from the New York statute, which this Court upheld as constitutional in New York v. Ferber, supra, against contentions that it was impermissibly "overbroad".

IV Section 29A is substantially overbroad in view of the numerous occasions when persons lawfully permit or cause visual representations to be made of children nude. Most such occasions are protected by the First Amendment.

In his Petition for a writ of certiorari, the Attorney General of Massachusetts invited the Court to answer the question whether the "overbreadth" of the Massachu-

setts child pornography law is substantial enough to justify invalidation of the entire statute and the reversal of Respondent Douglas Oakes' conviction.[5] [Petition at "Question Presented"] Amicus submits it is. The New York law which was upheld by this Court as not impermissibly overbroad is distinguishable in purpose and effect from the Massachusetts law. The basic difference lies in Section 29A's labeling as "child pornography" mere depictions of children nude (i.e., "in a state of nudity"). In doing that the legislature overbroadly swept within the compass of the State's criminal law a great deal of conduct that "virtually every person would regard as lawful," ranging from the parent

[5]The ten year sentence meted out to Oakes contrasts bizarrely with the 45 days to which Ferber was sentenced.

who takes a frontal view picture of his or her naked child running on the beach, playing in a wading pool, or lying on a bearskin rug; to the parent who consents to his or her pubescent or adolescent son or daughter being photographed or filmed nude, or partially clad; to the professional photographer, artist or sculptor who employs children as models or subjects in the course of his or her work; to the film director who casts a child actor or actress in a scene involving nudity; to the families who, in pursuit of a chosen life style, live, work and play as nudists and express and make a record of that life-style in photographs or films.

Indeed, Amicus is of the opinion that the conduct which Respondent Douglas Oakes engaged in when he took an assortment of pictures of his partially clad step-

daughter is the kind of conduct which probably cannot itself be proscribed. (See Trial Exhibits 1-10). But even if it were, it cannot constitutionally be punished under this statute because this statute is overbroad. In this connection we note that although Section 29A provides a defense if the photograph or other work is made "for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library," the defense is of no avail to persons wishing to have photographs of children taken for use in a modeling portfolio; or for exhibition in a commercial gallery, an art magazine, a book of photographs of the nude, or the family photo-album; or for their own use or experimental purposes, or for uses by the child.

Thus, if a photographer wished to pho-

tograph a 17-year-old girl with her breasts bared for any of the purposes indicated, the parent or custodian who requested or permitted such photographing, done with the consent as well of the child, would nevertheless be criminally liable. Furthermore, the photographer taking such a photograph for such use, with the parent's and child's consent, would also be subject to criminal prosecution and--inasmuch as good motive or salutary purpose is no defense--a severe punishment. This would follow even though no element of abuse or exploitation, and no "lewd" or "lascivious" intent existed, or was shown, and the girl asked to have herself so photographed. Thus there would be no way in which such photographs could lawfully be made, for First Amendment purposes.

V Unlike almost every other State, and the federal government, Massachusetts has gone too far in its response to the dangers of child pornography. There is no need to criminalize depictions of child nudity in order to defeat sexual child abuse, exploitation or endangerment.

Amicus is not here questioning the wisdom or validity of child pornography laws like the one which this Court upheld in Ferber. Unlike Section 29A, those laws criminalize the conduct of adults, including parents, who use the arts and techniques of photography and film to sexually abuse, exploit, or otherwise harm young children. Section 29A, by contrast was enacted and is being used (e.g. in this case) to prevent people like Respondent Oakes from taking nude photographs of their children, for example, to help them pursue acting and modeling careers, or for purely private (non-commercial) use as a family

record of stages in a child's physical development.

"Ferber-type" laws are aimed only at expressive conduct which involves children in inherently abusive, and exploitive ways; Section 29A too, is aimed at that sort of conduct. [See the detailed definition of "sexual conduct," proscribed by 29A, contained in Section 31]. But it is also directed at posing and depicting children nude under any and all circumstances. In seeking completely to blot out from the worlds of film and photography, and from family life, the image of the nude child, Massachusetts has gone too far. In reaching that far for control over images and ideas, the State has tread upon precious rights of freedom of expression and of parental rights to guide their own children's lives and careers.

Perhaps the legislature has now itself realized its mistep: On July 27, 1988 an amendment to Section 29A added to the elements of the crime of which Respondent Douglas Oakes was convicted a requirement that the defendant's "lascivious intent" be proved (c. 226, Acts of 1988). Whether the addition of this breathlessly broad and ambiguous mens rea can save the statute is, in Amicus' opinion doubtful; it does, however suggest that the Massachusetts legislature may finally have recognized, and sought to reduce, the immense overbreadth engendered by its attempt to indict all visual representations of child nudity that show genitals or female post-pubescent breasts.

There were clear indications in this Court's opinion in Ferber that the important governmental purpose of prevent-

ing "the sexual exploitation and abuse of children" would have to be carried out with due regard for the requirements of the First Amendment. Said Justice White, in his opinion for the Court in Ferber: "There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined...." Justice White went on to emphasize that the expression which is excludable from First Amendment protection as "child pornography" must be "limited to works that visually depict sexual conduct by children below a certain age." And, he continued, "the category of 'sexual conduct' proscribed must also be strictly limited and described." Finally, citing Erznoznik v.

City of Jacksonville, 422 U.S. 205 (1975), he observed that "nudity, without more is protected expression."

When, shortly after Ferber was decided, Section 29A was re-enacted in the form it would take when Respondent Douglas Oakes came to be indicted. In doing that, the Massachusetts legislature ignored some of those words of caution from Justice White. While the statute did "limit and describe" proscribed "sexual conduct" [see the detailed definition in Section 31], it failed utterly to "limit" the sweep of its definition of child pornography, excludable from First Amendment protection, to works that visually depicted such "sexual conduct." It failed by again enacting the proscription against any visual depictions of a child "in a state of nudity."

The Court's opinion had pointed out a

possible alternative to the blotting out of child nudity through use of the term "lewd exhibition of the genitals." As Justice White observed in Ferber, this term had been given, in Miller v. California, 413 U.S. 15, 25 (1972), as "an example of a permissible regulation."

Massachusetts, however, did not follow the Court's suggestion. Instead -- to judge from the legislative and law enforcement policies it pursued -- it sought to ban from sight every depiction of a child's genitals (not merely "lewd" ones) and every depiction of a pubescent or adolescent girl's breasts as well. Perhaps such sights, in the minds, at least of some concerned citizens, were "lewd" or "lascivious" per se; or they were felt improperly to invade the privacy of children so depicted.

For some citizens, at any rate, Ferber came to be interpreted as a decision which turned not so much on the likelihood alluded to by Justice White -- that a child will be "physically or psychologically harmed in the production of the work," -- but instead on the putative "privacy interests" of children who might someday regret the consents given by them or their parents[6] to persons making the visual representations in question. [See footnote 9 in Ferber, supra; See also: Brief Amici Curiae of Covenant house and The National Center for Missing and Exploited Children herein, at pp. 15-27; Brief Amicus Curiae of Citizens for Decency Through Law, Inc. herein, at pp. 5-8.

But, we submit, the privacy of post-

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[6]See Shields v. Gross, 58 N.Y.2d 337, 461 N.Y.Supp.2d 254 (1983).

pubertal girls, as of other girls and boys, can be and is adequately protected, and respected, with regard to non-abusive, non-exploitative (including nude) photography, by the law of torts and contracts and the legal requirements of child and parental consent, where commercial uses are anticipated. Where commercial uses are not anticipated, the laws regarding parental rights of control over their children and parental obligations not to abuse, endanger, or neglect them, can suffice. In this connection, it should be noted that the prohibition of Section 29A against depictions of nudity deprives minors of the rights they otherwise enjoy, under contract law, to engage photographers to photograph them nude.

The "legitimate sweep" of Section 29A properly ends with the sort of "sexual

conduct" described in Section 31. Beyond that is mere "nudity" and far-reaching overbreadth.

VI Under Section 29A, no one can tell whether a Massachusetts prosecutor will label a "family-album" nude child photograph "innocent," or a nude child "art" photograph "legitimate"; or, on the contrary, "sexually suggestive" and "criminal." The prosecution of Douglas Oakes for taking "pin-up" type pictures of his partially clad teenaged step-daughter is an example of how an over-broad law may be abused by prosecutors.

Petitioner claims to know of "no cases in Massachusetts that involve prosecutions under Section 29A for the "taking of innocent family-album-type photographs of children or anything resembling legitimate art." [Brief for Petitioner at 29]. In saying this Petitioner not only concedes that Section 29A is impermissibly over-broad, but suggests that it is unconstitu-

tionally vague as well. Under an overbroad law like Section 29a, citizens cannot be sure they will not be prosecuted and imprisoned for conduct which they know ought to be protected, but which the terms of the law proscribe. Under a vague law, as Section 29A is being construed by Petitioner, citizens cannot tell what is lawful and what is not, and those who enforce the law are permitted to be arbitrary and discriminatory in the decision of whom to arrest and prosecute. [See Papachristou v. City of Jacksonville, 405 U.S. 156 (1971); Tribe, American Constitutional Law at 718 ff. (1978)]

Who is to tell whether the parent who takes a picture of his or her son or daughter, in the bathtub is taking "an innocent family-album type" photograph or one, instead, which the District Attorney

would consider "sexually suggestive" and therefore "sexually exploitative" and "criminal"? Who is to tell whether the photographer who takes a picture of a consenting mother's minor daughter nude in his studio is creating "legitimate art" or a photo which the District Attorney would see as "sexually suggestive" and, accordingly, "sexually exploitative," "criminal", and worth ten years of prison time? Can it be doubted that the average photographer or the average parent, faced with the possibility of being required to spend a minimum of ten, and a maximum of twenty, years in prison as the price of taking an "innocent" family-album or "legitimate" art photograph -- if the District Attorney, in his unbridled discretion, considers it "sexually suggestive" -- will opt for taking no photographs

at all? These are the <u>real</u> effects of "overbreadth".

The evidence showed that Respondent Oakes did nothing more than take pictures of his partially-clad teen-aged step-daughter, lounging atop the bar in the family's rec room, in a mode that was traditional to "pin-up" art photography. Was Douglas Oakes sentenced to spend ten years in prison because although he thought he was making "pin-up" art, the District Attorney thought they bore no resemblance to "legitimate art"? Says the Petitioner in his brief on the merits at page 32: "The poses, chosen by Oakes, are obviously contrived and are either sexual or sexually suggestive." Elsewhere, he calls the shots "Playboy-type poses" as though this would suffice to condemn them (Petitioner's <u>Brief</u> at p. 31)

We do not find them so. And we do not believe this Court can find them so. (See Trial Exhibits 1-10). It is noteworthy that the only analagous cases alluded to by Petitioner are cases which involved not visual depictions of mere child nudity, but "lewd" or "lascivious" exhibition of the genitals. [Cases cited footnote 32, Brief].

But even if the photographs in this case could reasonably be found "sexual" or "sexually suggestive," such attribute is not relevant to the "crime" defined by Section 29A, which permits judges and juries to convict on a mere finding of nudity. That is why 29A is unconstitutional. The statute's proscription is so vague and/or overbroad that many "family-album-type" nude child photographs and many nude child photographs

"resembling legitimate art" may be deemed criminal child pornography -- in the prosecutor's unbridled discretion, which is to say whenever he sees them as "sexually suggestive," not "innocent" or "legitmate". But this is to put a public prosecutor in every family rec room and in every photographer's studio.

The trouble with vague laws is that people have to guess at their meaning. The trouble with overbroad laws is that they threaten to punish persons for engaging in conduct which is constitutionally protected. Section 29A forbids the taking of photographs of children nude. Standing alone, the taking of pictures of children nude is not criminal; it is expressive conduct that is constitutionally protected. Erznoznik v. City of Jacksonville 422 U.S. 205 (1975); Sunshine Book Co. v. Summer-

field, 355 U.S. 372 (1958). The serious and widespread chilling effect which Section 29A, if sustained, can be expected to have upon parents, photographers, and others wishing to express ideas and emotions about children through film and photography militates against this Court sustaining this law.

Such laws and such prosecutions are not necessary to the defeat of child pornography, child exploitation, or child abuse. Their purpose and potential effect instead is to erase the image of the nude child from popular cultural consciousness and private expression. That is an illegitimate because a censorial purpose; it is one which cuts to the heart of free expression.

VII There are many instances in which critically acclaimed photographers, filmmakers, and artists produce works involving child models and actors that would be criminal if Section 29A were applied to them.

In Ferber, supra, this Court upheld the validity of a child-pornography statute against a claim that it was unconstitutionally overbroad. To do so, the Court had to overrule a holding of the New York Court of Appeals that the law was fatally overbroad, thereby violating the First Amendment. Ferber v. New York, 52 N.Y. 2d, 674, 422 N.E.2d, 523 (1981). The Court's reasoning in Ferber was that New York's child-pornography statute was a law "whose legitimate reach dwarf(ed) its arguably impermissible applications," and so one only marginally overbroad. The only impermissible applications imaginable by the Court, under the New York law, were the unlikely occasions in which there was a need to employ children to engage in "sexual conduct -- "in order to produce

protected educational, medical or artistic works." Justice White pointed out that it was not even "suggested" that such impermissible applications of the statute could amount "to more than a tiny fraction of the materials within the statute's reach."

Here, however, the situation is dramatically different. Here, the impermissible applications of the statute -- the posing of children "in a state of nudity" -- is a frequent incidence of both family life and the photographic arts. Here, instances of potential impermissible applications abound. Of particular concern to Amicus, as it has indicated, are the myriad occasions when photographers and other artists wish to make a creative statement by taking pictures or making other visual representations of children nude, or

partially clothed. Under Section 29A, such artistic expression is foreclosed even with parental (and child) consent. In fact, 29A criminalizes the consenting act of the parent as well as the artistic act of the photographer.

Photographic and other artistic visual representations of children nude are, as previously suggested, ordinarily designed to communicate some esthetic, emotional, psychological, or physical "truth" perceived by the photographer (and his intended audience) as special to his subject matter. Statements of this nature cannot always be made through visual depictions of a child clothed. In such cases, it is the sight of the child's nude body, or of some feature of the child's nude person, which is crucial to the photographer's communicative purpose. Appendix A to

this brief consists of a small sample of nude pictures taken by recognized and critically acclaimed photographers, collected from named, widely-available published books on photographic art. Were the men and women who took these pictures, or any of the more than a hundred nude photographs reproduced in the books we have listed in Appendix B-1, to be subject to the Massachusetts law, all would commit crimes calling for lengthy prison terms.

Section 29A's clearly overbroad and possibly vague prohibitions similarly jeopardize the freedom of filmmakers to employ child actors and the freedom of painters, sculptors, and other graphic and fine artists, to employ child models. The critically acclaimed motion picture Pretty Baby, directed by the distinguished French filmmaker Louis Malle, is probably the most

obvious example, from the motion picture field. We have identified a few other such arguably "criminal" films in Appendix B-2.

Finally, Amicus has attached as Appendix C reproductions of copies of five internationally acclaimed works by the painters Stanislaus Klossowski de Rola Balthus, Dod Procter, and Graham Ovenden, the creation of which in Massachusetts, involving a use of child models, would also violate the law. We find it hard to imagine this Court approving such a gross censorship of beauty and humanistic expression.

VIII Rights of parental control and family privacy, taken together with rights of free expression, should preclude criminalization of parental conduct causing or permitting visual representations of their children nude -- except when definite elements of child abuse or endangerment are present and proved.

When conduct by a child's parent or custodian is engaged in for purposes of expression, rights of parental control and family privacy, as well as First Amendment rights, preclude the criminalization of such conduct unless definite elements of child abuse or endangerment are present and proved. A state has a legitimate, even compelling, interest to prevent such abuse and endangerment of children; this interest can justify prohibiting parental conduct, including expressive conduct, to the extent necessary to prevent such abuse and endangerment, under properly drawn statutes. This much Ferber affirmed and this much Massachusetts's proscription of depictions of child "sexual conduct" would accomplish. (See Section 31.) However, Section 29A prevents a parent or custodian from

photographing or consenting to the photographing of his or her child nude in the absence of any showing whatsoever that an element of child abuse, exploitation, or endangerment is present. The application of Section 29A to criminalize Respondent Oakes' conduct in taking "pin-up" pictures of his stepdaughter nude above the waist -- in the absence of any evidence that the circumstances were abusive, endangering or exploitive -- itself demonstrates the impermissible encroachment of the law upon parental and family rights of privacy and freedom of expression. Since Section 29A as construed and applied in this case criminalizes the posing of children nude by or with the consent of parents under all circumstances, even those concededly benign and salutary, it is unconstitutional.

CONCLUSION

For all of the foregoing reasons, the judgment of the Supreme Judicial Court of Massachusetts, declaring Section 29A to be unconstitutionally overbroad, should be affirmed.

Respectfully submitted,

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Counsel of Record

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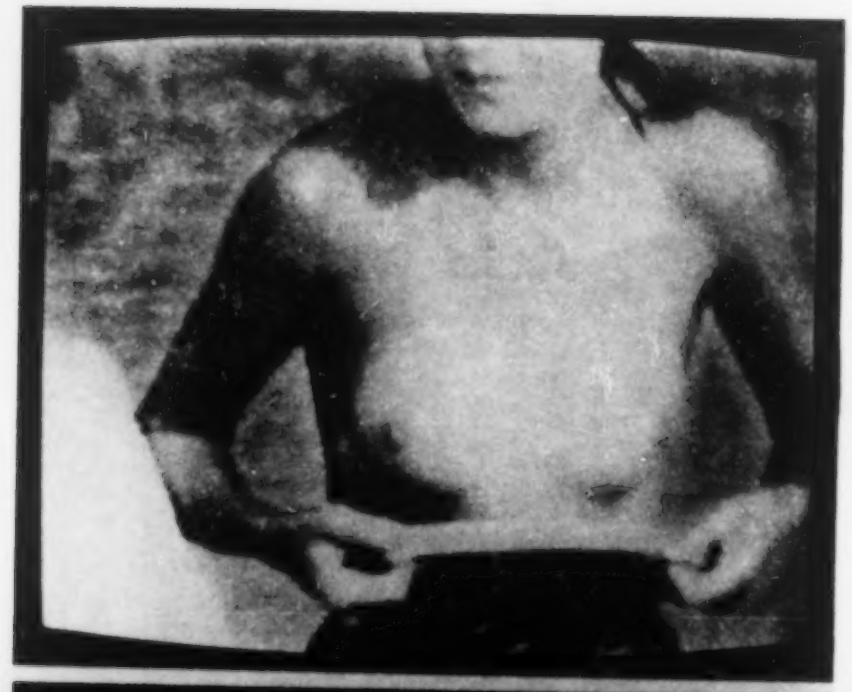
Of Counsel

Plate 1

Plate 2



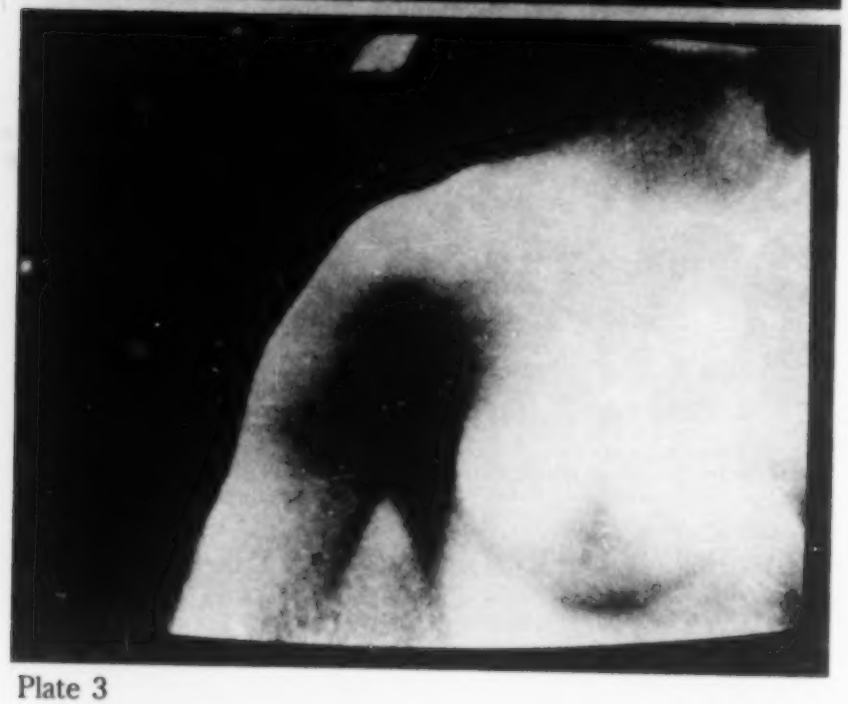


Plate 3

Plate 4

Plate 5

Plate 6

Plate 7

Plate 8

Plate 9

Plate 10

Plate 11

Plate 54

Plate 55

Plate 22

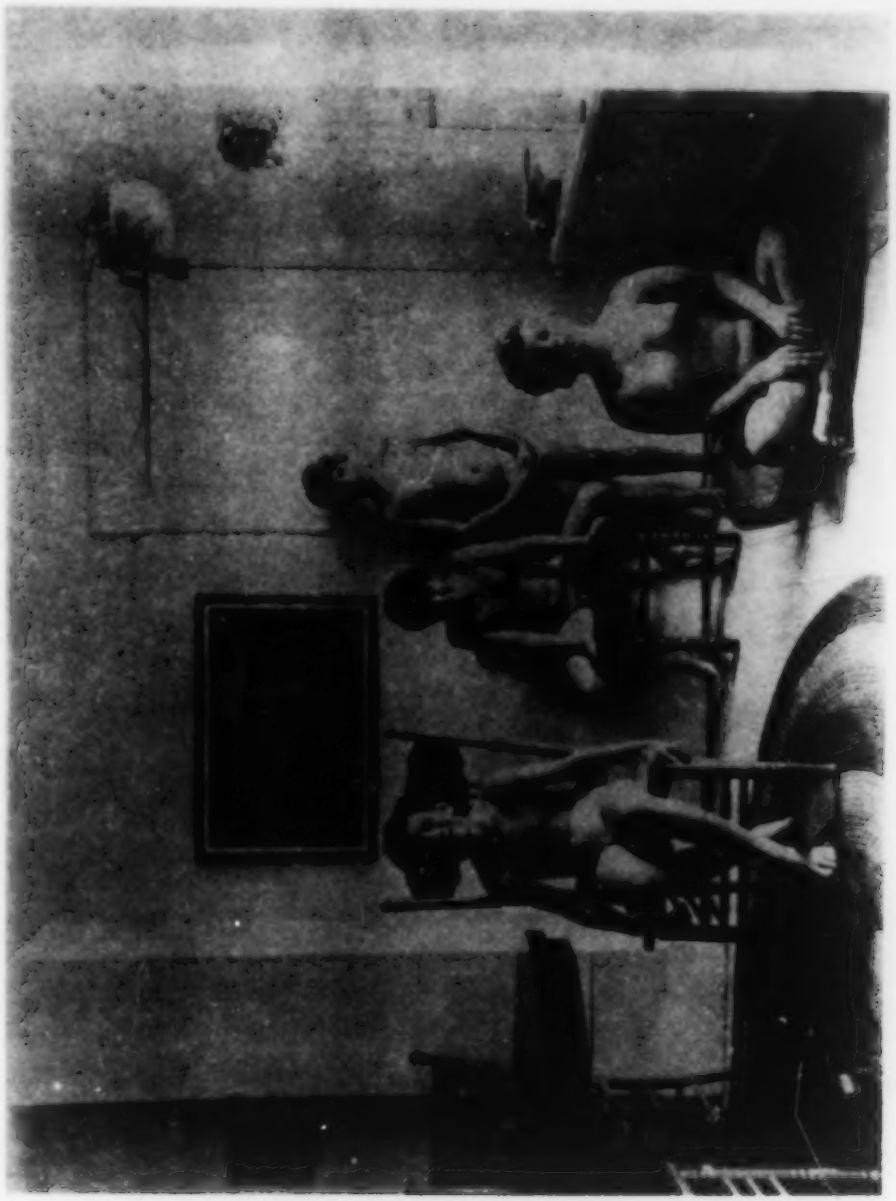


Plate 23

Plate 51

Plate 50

Plate 17

Plate 18

Plate 16

Plate 17

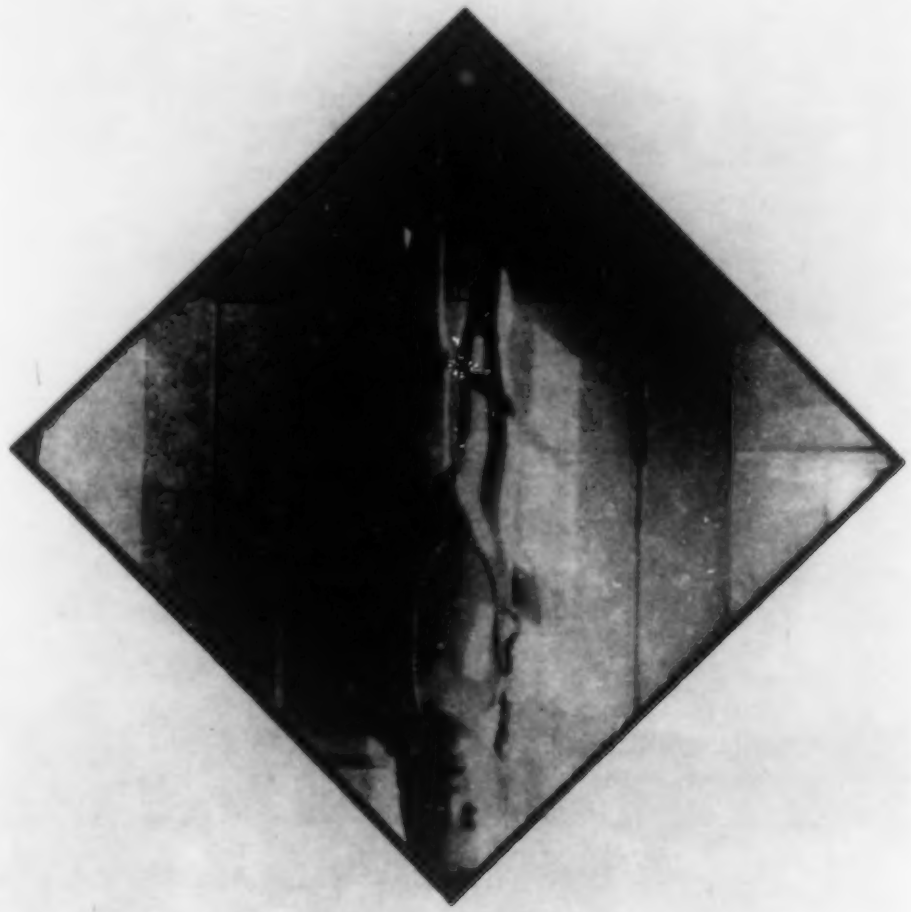


Plate 14

Plate 15

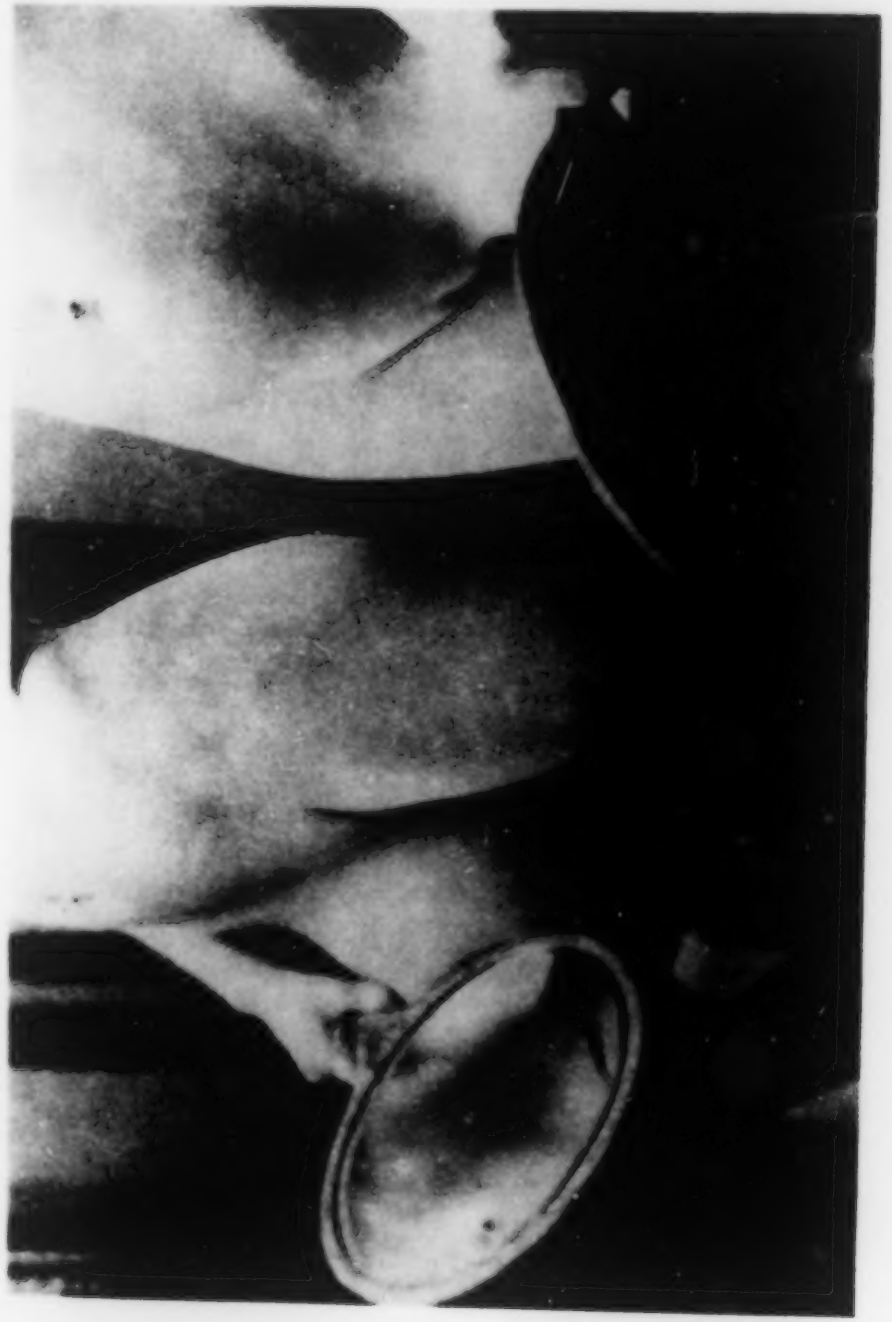


Plate 13

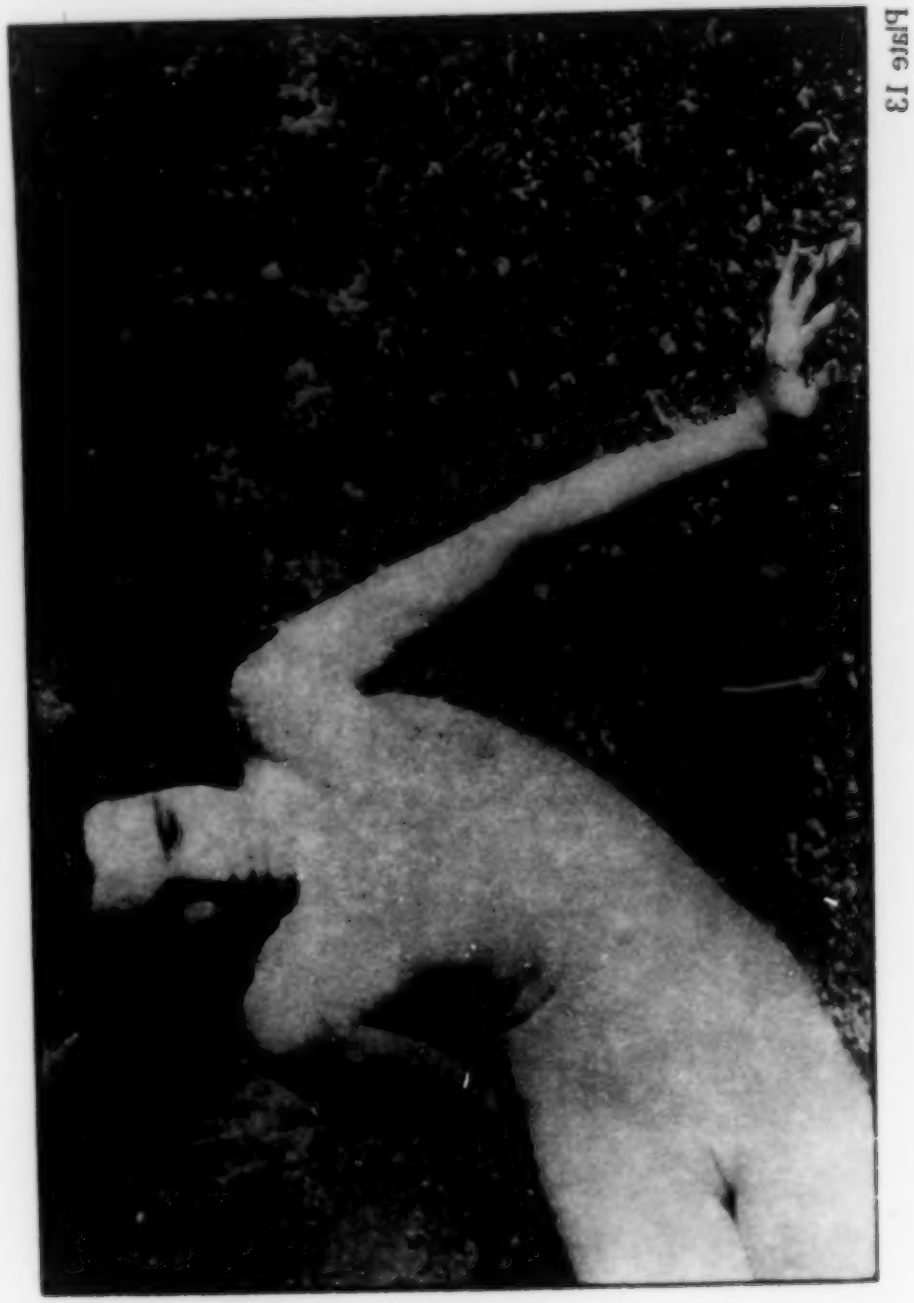


Plate 14

Titles - Photographers - Publications,
Plates 1-25

*Plate 1: Sally Mann. In Mann, Sally. At Twelve. New York: Aperture, Inc., 1988.

*Plate 2: Irina Ionesco, "Columbine, 1975". In Photography Year 1977. New York: Time-Life Books, 1977.

Plate 3: Larry Rivers. In Malanga, Gerard. Scopophilia. The Love of Looking. New York: Alfred van der Marck Editions, 1985.

Plate 4: Robert Demachy, "Primavera, series, 1896". In Demachy, Robert. Photographe. Paris: Contrejour, 1980.

Plate 5: Angelo Cozzi. In Cozzi, Angelo. Innocence in the Mirror. New York: William Morrow & Co., 1978.

Plate 6: Charles du Bois Hodges, "Little Sister". In Hodges, Charles du Bois. Search of Young Beauty. Cranbury, NJ: AMPHOTO (A. & S. Barnes & Co.), 1964.

Plates 7: Charles du Bois Hodges, "Contour & Relief". In Hodges, Charles du Bois. Search of Young Beauty. Cranbury, NJ: AMPHOTO (A. & S. Barnes & Co.), 1964.

Plate 8: David Hamilton. In Hamilton, David. The Young Girl. New York: William Morrow, 1978.

Plate 9: Dorothea Lange. In Sullivan, Constance. Nude Photographs 1850-1980. New

York: Harper & Row, 1980.

Plate 10: Bob Willoughby. In Mason, Jerry. The Family of Women. New York: The Putnam Publishing Group / The Ridge Press, 1979.

Plate 11: Christian Vogt, "Nina". In Selections 1: From the Polaroid Collection. Shaffhausen, Switzerland/Cambridge, MA: Polaroid Corp., 1982.

Plate 12: George Platt Lynes. In Sullivan, Constance. Nude Photographs 1850-1980. New York: Harper & Row, 1980.

Plate 13: Cynthia MacAdams. In MacAdams, Cynthia. Rising Goddess. New York: Morgan & Morgan, 1983.

Plate 14: Beth Saari, "Noelle, 1980". In Minkkinen, Arno. New American Nudes. New York: Morgan & Morgan, 1984.

Plate 15: Ralph Gibson. In Gibson, Ralph. L'Anonyme. New York: Aperture/Contrejour, 1986, and Days At Sea. New York: Lustrum Press, Inc., 1974.

Plate 16: Jan Saudek, "La tentation, 1970". In Saudek, Jan. The World of Jan Saudek. New York: Aperture, 1984.

Plate 17: Starr Ockenga. In Ockenga, Starr. Mirror After Mirror. Reflections on Women. Garden City, NY: AMPHOTO, 1976.

Plate 18: Joan Liftin. In Olsen, Tillie & Estelle Jussim. Mothers & Daughters. That Special Quality. New York: Aperture Foundation, Inc., 1987.

*Plate 19: Imogen Cunningham. In Sullivan, Constance. Nude Photographs 1850-1980. New York: Harper & Row, 1980.
Plate 20: Peter Simon. In Simon, Peter. Moving On/Holding Still. New York: Grossman Publishers, 1972.

Plate 21: John Benson, "Children at Home, Provincetown, MA". In Kinderen voor de camera. Amsterdam: Time-Life Books, 1983.

Plate 22: Tamarra Kaida, "Kris & Paul" from "Fathers/Sons," 1980. In Minkkinen, Arno. New American Nudes. New York: Morgan & Morgan, 1984.

*Plate 23: Edward Weston, "Neil". In Sullivan, Constance. Nude Photographs 1850-1980. New York: Harper & Row, 1980.

Plate 24: Wilhelm von Gloeden, "Jugendlicher mit Blumenkrantz, ca. 1900." In Pohlmann, Ulrich. Wilhelm von Gloeden - Sehnsucht nach Arkadien. Berlin: Dirk Nishen Verlag, 1987.

Plate 25: Bob Seidemann. From the album "Blind Faith," by the group Blind Faith, released by Polydor Records in 1969. A reproduction of this famous cover also appears in a box set, Crossroads, by Eric Clapton, a compilation released by Polydor (U.S.) in 1988.

*Photographs which depict the photographer's child.

The Photographers

COZZI, Angelo. (b. Milan, 1934). During the 60s, Cozzi was worked as a photojournalist for Mondadori Publishing Co. (Italy) and the popular magazines Grazia, Epoca, Storia Illustrata, and Domenica del Corriere. His photographs of the coronation of the Shah of Iran were the first photographs ever to be used on cover of the latter magazine. Cozzi has photographed many important world events of the 60s and 70s, including the Vietnam War, the 1967 Arab-Israeli War, the launching of Apollo II at Cape Kennedy. In 1969, he was awared the Priathlon Club prize for best sports photography for his coverage of the Olympics. His photographs of young girls reflected in mirrors have been exhibited in Milan and New York. [Plate 5]

CUNNINGHAM, Imogen. (b. Portland, 1883). Cunningham studied photography with Gertrude Casebier and studied photochemistry in Seattle from 1902-6. As assistant to Edward S. Curtis, Cunningham learned the platinum print technique. In 1910, Cunningham opened her portrait studio in Seattle and moved to San Francisco 1917, where she lived until her death in 1976. In the early 30s, together with Edward Weston, Ansel Adams, and Dorothea Lange, she co-founded the photographic group f/64 and from 1935 on produced primarily portraits and still lifes. Cunningham taught at the California College of Art (Oakland), the San Francisco Art Institute, and the Ansel Adams Workshop, Yosemite Park, California. She received a Guggenheim

Fellowship in 1970, the Artist of the Year award from the San Francisco Arts Commission in 1973, and the Summa Laude Dignatus Award from the University of Washington, 1974. Among the institutions which have collected Cunningham's work are the San Francisco Museum of Modern Art, the Center for Creative Photography, University of Arizona (Tucson), the Art Institute of Chicago, the International Museum of Photography, George Eastman House, the Metropolitan Museum of Art, the Smithsonian, and the Library of Congress. [Plate 19]

DEMACHY, Robert. (b. Paris, 1859). In 1882, Demachy was appointed to the Societe Francaise du Photographie and became a major proponent of pictorialism in France. After publishing in the presigious American publication, Camera Work (1904), he was awarded the Chevalier de la Legion d"Honeur of France and was nominated to the Royal Photographic Society (U.K.) as an honored member (1905). He is the author of numerous articles on aesthetics, the practice of photography, and photographic chemistry and technique. His work is in the collections of the Biblioteque Nationale (Paris), the Metropolitan Museum of Art, and the Gernsheim Collection, University of Texas, Austin. [Plate 4]

GIBSON, Ralph. (b. Los Angeles, 1939). From 1956-60, Gibson was a photographer for the U.S. Navy. During the early 60s, he was an assistant to Dorothea Lange and camera man for Robert Frank, after which he worked as a freelance photojournalist and fashion/publicity photographer. In 1970, Gibson founded Lustrum Press, a leading American

photographic publishing company. He was the recipient of a National Endowment for the Arts Photography Fellowship in 1973 and again in 1975, a Creative Artist Public Service Grant (New York), and the DAAD Exchange Fellowship (Berlin). He has exhibited throughout the world in such prestigious galleries and museums as Castelli Graphics (New York), International Museum of Photography, George Eastman House (Rochester), Baltimore Museum of Art, Kunstmuseum (Duesseldorf), and the Center for Creative Photography, University of Arizona (Tucson). His work is in the collections of the National Gallery of Canada, the Biblioteque National (Paris), the Victoria and Albert Museum (London), the Fogg Art Museum (Harvard University), the San Francisco Museum of Modern Art, the George Eastman House, and the Museum of Modern Art. [Plate 15]

von GLOEDEN, Wilhelm. (b. 1856, Mecklenburg, West Germany). In 1880, suffering from ill health, von Gloeden moved to southern Italy, where he learned photography from Wilhelm Plueschow. Von Gloeden is one of the most frequently written about of the early photographers and is best known for his Arcadian scenes and nudes and semi-nudes of adolescent boys taken in Sicily and Naples. [Plate 24]

HAMILTON, David. (b. England, 1933). Hamilton has been art director for Queen magazine (London) and his work has appeared in Twen, Esquire, Vogue, Penthouse, Playboy, and Oui. He has exhibited his work at the Photogalerie Portfolio (Lausanne) and his own Galerie Mona (Paris). Hamilton has pro-

duced over ten popular books of photographs of young girls and has sold more than 500,000 of those books throughout the world. [Plate 8]

HODGES, Charles Du Bois. A graduate of Princeton University in 1930, Hodges studied photography at the Clarence White School of Photography in Maine in 1931-2. During World War II, he was a photographer for the U.S. Navy and, after the war, established a commercial photography business in Springfield, Massachusetts. He was the official family photography for Sargent Family of Massachusetts and lectured motion picture and portrait photography at University of Massachusetts. His work has been exhibited at the Berkshire Museum (Pittsfield, MA); the Jasper Rand Art Museum (Westfield, MA); the City Library (Springfield, MA); the Holyoke Museum (Holyoke, MA); and The Art Gallery (Springfield, MA). His work is featured in his book, In Search of Young Beauty, as well as in Photo Maxima, vol. 4, an annual juried collection of the finest photography in the United States. [Plates 6-7]

IONESCO, Irina. (b. 1935, Paris). Ionesco's work has been exhibited in galleries as far apart as Paris' Galeries Loplop and Nikon, the Canon Photo Gallery in Geneva, Galleria Spectrum, Barcelona, and Tokyo's Pentax Gallery. The photograph reproduced here, Columbine, 1975, is of her daughter Eva at eleven years of age. Ionesco was chosen "Woman of the Year" by Time-Life in 1977. [Plate 2]

KAIDA, Tamarra. Tamarra Kaida received her M.F.A. in 1979 from the State University of New York at Buffalo and the Visual Studies Workshop in Rochester. Her black and white portraits of children have been a part of several major exhibitions in the past year, including "Contemporary Photography and Phantasy" at the Santa Barbara Museum of Art, and "Between Twelve and Twenty" at the Loomis Institute, Windsor, Connecticut. In recent years, her images have appeared in such publications as Camera 35, Exposure, and the Time/Life Library of Photography. Kaida received the Ferguson Grant from the Friends of Photography. She is also on the faculty at Arizona State University in Tempe. [Plate 22]

LANGE, Dorothea. (b. NJ, 1895). Lange studied photography at the Clarence White School, Columbia University and was a co-founder of the group, f/64 during the 1930s. She was photo-reporter for the California Rural Rehabilitation Administration (Resettlement Administration, later Farm Security Administration (FSA) under Roy E. Stryker, q.v. from 1935); the U.S. War Relocation Agency in 1942; the Office of War Information, 1943-5; and on the staff at Life Magazine during the 50s. In 1941, Lange received the Guggenheim Fellowship. Her works are in the collections of the Museum of Modern Art, New York Public Library, George Eastman House, Library of Congress, Photographic Archives, University of Kentucky, and the San Francisco Museum of Modern Art, among others. [Plate 9]

LIFTIN, Joan. (b. NJ, 1935) During the 1970's Lifton was photo editor of the United

Nations Children's Fund and assignment photographer for UNICEF. Her work has been shown in many exhibitions, including the Lyman Allyn Museum, the Neikrug Gallery, and the Soho Photo Gallery. Since 1975, she has been the director of the Magnum Library. Examples of her works were purchased by the George Eastman House. [Plate 18]

LYNES, George Platt. (b. NJ, 1907). Lynes was a self-taught photographer who achieved fame with his portraits of famous writers, composers, theater people and artists, including Stravinsky, Cocteau, Auden, and Chagall. During the 40s, he was the head of Vogue studios in Hollywood. His work appeared in Town & Country, Harper's Bazaar, Vogue, and other fashion magazines. His photographs are in the collections of the Metropolitan Museum of Art, the Museum of Modern Art, the New York Public Library, the George Eastman House, Smith College (MA), and the Art Institute of Chicago. [Plate 12]

MacADAMS, Cynthia. (b. SD, 1939). MacAdams graduated from Northwestern University in 1961 and spent 15 years as an actress before turning to photography. She is best known for her bold protraits of women and her nude studies of women and girls. Her portraits of women were published in the book, Emergence in 1977. [Plate 13]

MANN, Sally. Mann has exhibited and taught nationally. Her work has been collected by the Metropolitan Museum of Art, the Museum of Modern Art, the Chrysler Museum, the Corcoran Gallery, the San Francisco Museum of

Modern Art, and other major collections throughout the United States. She has received grants from the National Endowment for the Arts, the National Endowment for the Humanities, the Friends of Photography and, most recently, the John Simon Guggenheim Foundation. She is represented by the Marcuse Pfeifer Gallery in New York, where she has had three major shows over the past two years. [Plate 1]

OCKENGA, Starr. (b. Boston, 1938). Ockenga was a student of Robert Heinecken, Aaron Siskind and Harry Callahan. In 1974, she received as MFA in Photography from the Rhode Island School of Design and was appointed photo editor and chief photographer for the Lawrence (MA) Eagle Tribune. From 1976-82 she was first assistant professor of photography and then Director of the Creative Photography Laboratory at the Massachusetts Institute of Technology. In 1984, she was a visiting professor at Bennington College, Vermont. Ockenga has received various grants and awards, including a National Endowment for the Arts fellowship for a series of nudes (1981) and a grant from the Massachusetts Artist Foundation. Her work has been included in exhibitions the world over, including "Photography Unilimited" at the Fogg Museum (Harvard University), and "Photography as Fine Art," a traveling show prepared by the United States Information Agency for sixty United States embassies overseas. Her work is in the collections of the Museum of Modern Art and the Bibliotheque National (Paris). [Plate 17]

RIVERS, Larry. (b. New York, 1925) Rivers is a visual artist who works with canvas, paint and mixed media and is well-established among contemporary artists. Rivers studied at the Hans Hofmann School of Fine Arts, New York University, in 1948-9. Works in Brooklyn Museum, Corcoran Gallery of Art, Kansas City Art Institute, Metropolitan Museum, the Museum of Modern Art, the Hirshhorn Museum (Smithsonian), the Minneapolis Institute of Art, and in many private collections. The depictions reproduced here were from a videotape which Rivers made of his daughters' breasts as they developed. [Plate 3]

SAUDEK, Jan. (b. Prague, 1935). Saudek graduated fro the School for Industrial Photography and Technique, Prague, in 1955. Shortly after tha, he established his own studios and has gained an international reputation for his nudes and handcolored photographs. He has exhibited at Recontres d'Arles (France), Photokina (Cologne), FNAC (Paris), Marcuse Pfeifer (New York), Camden Arts Centre (London), National Gallery of Victoria (Melbourne), the Art Institute of Chicago, and the University of Indiana, Bloomington. Saudek's work has appeared on over two dozen postcards and posters sold in art shops and bookstores across the United States. [Plate 16]

VOGT, Christian. (b. 1946, Basel). Christian Vogt began his career as an assistant to Will McBride. Since the early 70's he has been a fee lance photo designer and the best known Swiss art photographer today. He is the recipient of a number of prizes and grants, including the Photokina Award,

Cologne; a Swiss National Scholarship; the Grand Prix, Trienniale of Photography, Fribourg; the Art Award, Lyon; a Canada Council grant; and the Art Directors Club Award, Germany. He has exhibited at the Canon Gallery (Amsterdam), International Center of Photography (New York City), Focus Gallery (San Francisco), University of North Dakota, Grand Forks, and Galerie Trockenpresse, West Berlin, among other places. [Plate 11]

WESTON, Edward. (b. Highland Park, 1886). Weston attended the Illinois College of Photography and established his first studio in Tropico, CA in 1911. In 1922, he met Alfred Stieglitz and Paul Strand and turned from art to pictorial photography. In the early 30s, Weston was a co-founder, together with Imogen Cunningham, Ansel Adams, and Dorothea Lange, of f/64. He was the first photographer to receive the Guggenheim Foundation Grant (1937) and is one of the best known and most revered photographers in photographic history. Weston's nude of his son, Neil, was printed by George Tice of the George Eastman House in 1973, fifteen years after Weston's death. [Plate 23]

WILLOUGHBY, Bob. (b. Los Angeles, 1927). Willoughby has travelled the world as a magazine photographer for Life, Look, Vogue, Harper's Bazaar). He worked as a specialist in covering motion pictures and since 1952, has worked on over 125 films, including "From Here to Eternity,", "A Star is Born," "The Man with the Golden Arm," "They Shoot Horses Don't They?," and "Catch 22,". His work has appeared in museums and galleries throughout the world, including the Museum of Modern Art, the California Museum of

Science and Industry, the George Eastman House, the World Exhibition of Photography, West Berlin, Central Culturel Americain (Paris), and the Canon Photo Gallery (Amsterdam). [Plate 10]

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Feature Motion Pictures
Made "In Violation Of" Section 29A
(country of origin - director - year released)

*Alice In the Cities
(West Germany - Wim Wenders, 1974)

Anous Amour
(France - Sandrine Bonaire, 1984)

*Beau Pere
(France - Bertrand Blier, 1981)

*Bilitis
(France - David Hamilton, 1976)

Circle of Two
(U.K. - Jules Dassin, 1980)

*Emerald Forest
(U.S. - John Boorman, 1985)

Gaughin: The Wolf at the Door
(Denmark/France - Donald Sutherland, 1986)

Jail Bait
(Germany - Rainer Fassbinder, 1972)

*L'Adolescente
(France - Jeanne Moreau, 1979)

Laura
(U.K. - David Hamilton, 1979)

*Light of Day

(U.S. - Paul Schrader, 1987)

*Murmur of the Heart
(France - Louis Malle, 1971)

*The Mission
(U.K. - Roland Jaffe, 1986)

*My Life As A Dog
(Sweden - Lasse Hallstrom, 1987)

Nea: The Young Emmanuelle
(France - Nelly Kaplan, 1976)

Paradise
(Canada - Stuart Gillard, 1981)

*Pixote
(Brazil - Hector Babenco, 1980)

*Pretty Baby
(U.S. - Louis Malle, 1978)

*Shadows of Forgotten Ancestors
(Russia - Sergei Parajanov, 1964)

A Summer in San Tropez
(France - David Hamilton, 1981)

*Tender Cousins
(France - David Hamilton, 1980)

To The Devil...A Daughter
(U.K. - Peter Sykes, 1976)

*Walkabout
(U.K. - Nicholos Roeg, 1970)

*The Wrong Move

(Germany - Wim Wenders, 19--)

* indicates videocassette versions, as well as general distribution

Plate A

Plate B

Plate C

Plate D

Plate E

Paintings Made "In Violation Of"
Section 29A, Plates A-E

Plate A: Dod Procter, Untitled, from Private Collection.

Plate B: Balthus, "Nu de profil, 1973-7". In Balthus. New York: Harper & Row, 1983.

Plate C: Balthus, "Getting Up, 1975-8". In Leymarie, Jean. Balthus. New York: Rizzoli, 1982.

Plate D: Graham Ovenden, "The Three Muses". In Ovenden, Graham. Graham Ovenden. London/New York: St. Martin's Press/Academy Editions, 1987.

Plate E: Graham Ovenden, "Cockney Graces, 1984". In Ovenden, Graham. Graham Ovenden. London/New York: St. Martin's Press/Academy Editions, 1987.

Appendix C-3

Bibliographic Sketches of Painters, Plates A-E

BALTHUS, Stanislas Klossowski de Rola. Balthus's career began in 1934 at the Galerie Pierre in Paris, then one of the focal points of Surrealism. He did not actually begin selling paintings until 1938, when an American collector purchased his masterpiece, "The Street". He is a modern master whose nudes of pubescent and adolescent girls and landscapes hang in museums all over the world, including the Metropolitan Museum of Art, where a major retrospective was held of his work in 1986, the Museum of Modern Art, the Centre Georges Pompidou, the Philadelphia Museum of Art, and the Hirshhorn Museum (Smithsonian).

OVENDEN, Graham. (b. UK, 1943) Ovenden attended the Royal College of Art from 1965-68. One-man exhibitions were held at the Piccadilly Gallery, London, in 1970, 72, 77, 79 and 87, and an exhibition of prints was held at the Waddington Galleries, London, in 1970. He is co-author with Robert Melville and David Cecil of numerous books on nineteenth century photography published by Academy Editions. Along with Ann and Graham Arnold, Peter Blake, David Inshaw, and his wife, Annie Ovenden, Graham Ovenden is a member of the Brotherhood of Ruralists, who share a passionate concern for English artistic skill and craftsmanship and who see their work as the celebration of the visual tradition in English art, and its ultimate

source, the spirit of the countryside. In 1988, Parco, in Japan, undertook a an major exhibition of Ovenden's photographic work, as well as paintings, drawings, and Victorian photographs from his extensive collection.

PROCTER, Dod. (b. UK 1982, d. 1972) Procter graduated from the Royal Academy of Art and was featured in its yearbooks in nearly every year from her graduation up until about 1930. Her work has received considerable attention over the past 5 years with the revival of the Newlin school (See Painting in Newlin, 1900-1930, London: British Arts Council, 1985.) Her work is in collections at the Tate Gallery, the Birmingham, Manchester, and Sheffield Galleries, the National Gallery of Canada, and the National Gallery of Victoria (Melbourne). She is best known for her works depicting women, particularly adolescent females.